IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 305

FROST LUMBER INDUSTRIES, INC.,
Petitioner,

versus

REPUBLIC PRODUCTION COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI.

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May It Please the Court:

FOREWORD.

Wherever it becomes necessary to refer to various corporations involved in the transactions and documents hereinafter discussed, we shall, for the sake of brevity, refer to them as follows:

Frost-Johnson Lumber Company as "Frost-Johnson,"
Federal Petroleum Company as "Federal,"
Union Power Company, Inc., as "Union,"
and
Interstate Natural Gas Company, Incorporated, as "Interstate."

ARGUMENT.

The sole ground upon which petitioner predicates its claim to a writ of certiorari is its averment that the decision of the United States Circuit Court of Appeals is in conflict with the decision of the Louisiana Supreme Court in the case of *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, 182 La. 439, 162 So. 37 (Petition for Writ, Paragraph (B), Page 3; Petitioner's Brief, Paragraph II, Page 6).

Petitioner asserts that there is a conflict between the decision of the United States Circuit Court of Appeals and the Louisiana Supreme Court on two points, namely:

> "1. Was a new servitude created by the joint sale of gas to the Union Power Company in the year 1920 by the Frost Interests, owners of the land, and by the Federal Petroleum Company, owner of a mineral servitude thereon, who together represented perfect ownership?
>
> "2. Was the recital in the preamble to the deed conveying the gas in 1920, setting forth the proportionate ownership of the vendors in the minerals, a sufficient acknowledgment of the original mineral servitude in favor of the Federal Petroleum Company, to interrupt the running of the liberative prescription of ten-years non-use?" (Petitioner's Brief, Paragraph C, Pages 3 and 4).

This being the only question raised in the application for a writ, we submit that unless there exists a conflict between said decisions, petitioner's right to a writ immediately falls.

We shall now discuss the two points raised in the application for a writ of certiorari in the same order in which petitioner treats them.

POINT 1.

Was a new servitude created by the joint sale of gas to the Union Power Company in the year 1920 by the Frost Interests, owners of the land, and by the Federal Petroleum Company, owner of a mineral servitude thereon, who together represented perfect ownership?

We are at a loss to understand how petitioner can contend that there is a conflict between the decision of the United States Circuit Court of Appeals in the case at bar and the decision of the Louisiana Supreme Court in the case of *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, 182 La. 439, 162 So. 37, because the question now under discussion was not at issue, was not discussed, and was not passed on by the Louisiana Supreme Court in the case just mentioned.

The issues in the case of *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, are briefly stated by the Louisiana Supreme Court in said decision as follows (162 So. 38):

> "This suit was commenced by the Frost Lumber Industries, Inc., as an action of jactitation, or slander of title, for the purpose of obtaining a decree canceling and erasing from the public records the muniments of title under which the Union Power Company, Inc., holds the gas rights on the lands situated in the parishes of DeSoto and Sabine. The suit was converted into a petitory action by the Union Power Company, Inc."
>
> "Plaintiff filed a plea of ten years' prescription liberandi causa against defendant's title to the mineral rights. But defendant set up in its answer

> that the running of the prescription pleaded was interrupted by agreements between the parties, agreements between the plaintiff and other parties, resolutions of the board of directors of the plaintiff company, judicial allegations in other suits by plaintiff, letters written by the officers of the plaintiff company, and the execution of certain leases."

After discussing the Louisiana jurisprudence which was relied upon in said case, the court finally summed up the facts adduced upon the trial of the case in the following language:

> "On reviewing the evidence offered on the trial of the case, we find that the various documents on which defendant relies for the interruption of the prescription pleaded by the plaintiff do not describe any of the lands involved in this case. All the documents, with a few exceptions, refer only to lands situated in the parishes of Ouachita and Union. It is true that in many of the documents there is some reference to the original and operating contracts and some general language as to their ratification, but the documents themselves are clearly intended by the parties to operate only on lands in the two parishes above mentioned. They have no effect on lands situated in the parishes of DeSoto and Sabine, which are subject to entirely different and distinct servitudes. Hence, they are not sufficient to interrupt the running of prescription." (162 So. 40)

It should be noted here that the Louisiana Supreme Court case now under discussion was a suit instituted by the plaintiff against the defendant to remove a cloud operating on the title to plaintiff's lands located in the Parishes of Sabine and DeSoto, upon which no development had taken place, and the only question then involved was

whether or not the rights being asserted by the defendant had been lost through the operation of prescription *liberandi causa*. The question of whether Union held rights under the original servitude granted by Frost-Johnson in favor of Federal by the instruments dated January 12, 1917, or whether Union held under a new and distinct servitude created by the instruments entered into between Federal, et al., and Union on December 23, 1920, was in nowise involved in the Louisiana Supreme Court case. Consequently, the decision by the United States Circuit Court of Appeals that the December 23, 1920, instruments did not create a new servitude in favor of Union and did not dismember or divide the original servitude created in favor of Federal by the January 12, 1917, instruments does not, in any manner, conflict with the decision of the Louisiana Supreme Court in the case of *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, supra.

This exact point was raised before and passed on by the Circuit Court of Appeals. In discussing the Supreme Court of Louisiana decision in *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, supra, in connection with *Frost Lumber Industries, Inc., v. Federal Petroleum Company*, 20 Fed. Supp. 612, the Circuit Court said, in affirming this case:

> "A reading of the two cases relied on (the two cited above) will show that neither one of them will rule the case at bar. Neither of them concern the lands involved here. In each of them the servitude, as to the lands in the suit, had never been exercised. (R. 458).

In further distinguishing the Supreme Court of Louisiana case, the Circuit Court of Appeals states:

> "In the State Court case, while it is true that it was held that the December 23, 1920, transfer to Union was not a sufficient acknowledgment as to the lands in that suit, it was pointed out in the opinion that this was so because, 'On reviewing the evidence offered on the trial of the case, we find that the various documents on which defendant relies for the interruption of the prescription pleaded by plaintiff, do not describe any of the lands involved in this case. All the documents, with a few exceptions, refer only to lands situated in the Parishes of Ouachita or Union.' (the parishes in which lie the lands in this suit.)" (R. 458-459)

Thus, it is clearly shown by the Circuit Court of Appeals' opinion there is no conflict between its holding and the holding of the Supreme Court of Louisiana in the State Court case; in fact, the Circuit Court quoted and followed the holding of the Supreme Court case. The facts were different, but the rule of law is the same.

POINT 2.

> Was the recital in the preamble to the deed conveying the gas in 1920, setting forth the proportionate ownership of the vendors in the minerals, a sufficient acknowledgment of the original mineral servitude in favor of the Federal Petroleum Company, to interrupt the running of the liberative prescription of ten years non-use?

Petitioner asserts, in its application for a writ and in its statement of jurisdictional grounds, that there is a conflict between the decision in the United States Circuit

Court of Appeals in the case at bar and the decision of the Louisiana Supreme Court in the cast of *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, supra, with reference to the questions involved in point 2.

Appellant in the court below (petitioner in this court) contended that the decision of the Louisiana Supreme Court in *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, supra, was controlling with reference to the question here involved. This is apparent as the Court of Appeals, in its decision, particularly pointed out why the decision of the Louisiana Supreme Court was not controlling in the case at bar and took note of the fact that the Louisiana Supreme Court case involved lands located in another part of the State of Louisiana and on which no development had ever taken place whereas the instruments relied on in that case by defendant as acknowledgments sufficient to interrupt prescription dealt with lands located in the Parishes of Ouachita and Union and could not be construed as acknowledgments sufficient to interrupt the running of prescription with reference to the lands located in the Parishes of Sabine and DeSoto.

We believe petitioner now concedes that the distinction drawn by the United States Circuit Court of Appeals is correct and sound as in its brief (pages 26 and 27), it sets forth its construction of these decisions in the following language:

> "The Circuit Court of Appeals beginning at the bottom of page 10 of its opinion and continuing on page 11 (R. 460-461) further said:
>
> " 'In the State case (referring to the Union Power Company case) while it is true that it was held that

the December 23rd, 1920, transfer to Union was not a sufficient acknowledgment as to the lands in that suit, it was pointed out in the opinion that this was so because "On reviewing the evidence offered on the trial of the case, we find that the various documents on which defendant relies for the interruption of the prescription pleaded by the plaintiff, do not describe any of the lands involved in this case. All the documents, with a few exceptions, refer only to lands situated in the Parishes of Ouachita or Union." '

"*A mere reading of the language quoted by the Court of Appeals from the State case shows that the State Court was not referring to the December 23, 1920, instruments transferring the gas rights to the Union Power Company.* Both the Court of Appeals in this case and the State Court, in the Union Power Company case, found that the transfer to the Union Power Company made in December of 1920 conveyed the gas rights under the same lands described in the mineral deed from the Frost Interests to the Federal Petroleum Company in January of 1917. The lands described in the deed from the Frost Interests to the Federal Petroleum Company in 1917 and the lands described in the deed executed by said parties as vendors to the Union Power Company in 1920 described lands in the Parishes of DeSoto, Sabine, Natchitoches, Ouachita and Union including the lands in DeSoto and Sabine Parishes which were involved in the Union Power Company suit in the State Court. When, therefore, the State Court in the language quoted by the Court of Appeals, says:

" 'On reviewing the evidence offered on the trial of the case, we find that the various documents on which defendant relies for the interruption of prescription created by the plaintiff, do not describe any of the lands in this case,"

> *"it is clear that the documents by which the gas is conveyed to the Union Power Company are not among the documents referred to by the State Court.*
>
> "If the various documents 'on which defendant relies,' as stated by the State Court, did not describe any of the lands involved in the Union Power Company case in that Court, then the documents 'relied on' could not have included the deed and operating contract executed in December of 1920 under which the gas and gas rights conveyed to the Union Power Company, because these instruments did describe the lands involved in the Union Power Company suit."

It will, therefore, be seen that petitioner now concedes that the Louisiana Supreme Court in the opinion rendered by it in the case of *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, was not dealing with the instruments dated December 23, 1920, when it held that the instruments therein relied upon by defendant as acknowledgments were not sufficient to interrupt prescription. If such is the case (and we agree with counsel for petitioner that it is), then the Louisiana Supreme Court did not hold that the instruments dated December 23, 1920, were not sufficient to interrupt the running of prescription, and there is, therefore, no conflict between the aforesaid state court decision and the decision of the United States Circuit Court of Appeals in this case, holding that said instruments were sufficient.

Rule No. 38, Paragraph 2, of the rules of this court, reads:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

Since this court will consider only the specific questions brought forward by the petition for the writ, and since petitioner predicates its right to a writ on the one ground discussed above, we feel that the contentions which we have heretofore advanced demonstrate clearly that petitioner's application should be denied.

Petitioner's brief, however, is not limited to a discussion of the particular issue presented in the petition, but also includes a general discussion of the law and jurisprudence of the State of Louisiana applicable to the questions which were involved in this law suit and, in fact, reargues its entire case before this court just as though a writ had been granted and the case was being heard on its merits.

We do not believe that, at this stage of the proceedings, this court should be burdened with a discussion of all of the issues involved in the case including a citation of authorities in support thereof, but since petitioner has raised these issues, we shall briefly advance further reasons why, in our opinion, the decision of the United States Circuit Court of Appeals does not conflict with the Louisiana law and jurisprudence.

With reference to the particular questions involved in this case, the Louisiana jurisprudence applicable may be succinctly stated as follows:

> A conveyance by a landowner to another of the oil, gas and other minerals on, in and under said land, together with rights of ingress, egress and occupancy for purpose of exploitation, is not a grant

or alienation of a title to such minerals in place, but simply creates in said grantee a servitude or right of exploitation or development for such minerals and the right to appropriate such minerals as may be discovered and reduced to physical possessions. Frost-Johnson Lbr. Co. vs. Salling's Heirs, 150 La. 756, 91 So. 207; Wilkins vs. Nelson, et al., 155 La. 807, 99 So. 607; Clark vs. Tensas Delta Land Co., 172 La. 913, 136 So. 1; Louisiana Petroleum Company vs. Broussard, et al., 172 La. 613, 135 So. 1; Keebler vs. Seubert, 167 La. 901, 120 So. 591; Patton, et al., vs. Frost Lumber Industries, Inc., et al., 176 La. 916, 147 So. 33; Lieber vs. Ouachita Natural Gas & Oil Co., 153 La. 160, 95 So. 538; Bodcaw Lumber Co., Inc., vs. Cox, 159 La. 810, 106 So. 313; Frost-Johnson Lumber Company vs. Nabors Oil & Gas Co., et al., 149 La. 100, 88 So. 723.

Servitudes are indivisible, but the advantages resulting from the use or exercise of the servitudes are susceptible of division. Clark vs. Tensas Delta Land Co., supra; Sample, et al., vs. Whitaker, et al., 172 La. 722, 135 So. 38; Holladay vs. Darby, 177 La. 297, 148 So. 55; Civil Code, Articles 656 and 657.

To preserve the right of servitude and prevent prescription from running against it, it is not necessary that it should be exercised exclusively by the owner to whom it is due, or by those who use his rights, or who represent him directly, as the usufructuary, lessee or tenant, the attorney in fact or agent. It suffices if the servitude has been exercised by workmen employed by the owner, or by his friends, or those who come to see him. Louisiana Petroleum Company vs. Broussard, et al., supra; Keebler vs. Seubert, supra; Patton, et al., vs. Frost Lumber Industries, Inc., et al., supra; Johnson vs. Moody, et al., 168 La. 799, 123 So. 330; Smith, et

al., vs. Sun Oil Company, Inc., 165 La. 907, 116 So. 379; Lee vs. Giaque, 154 La. 491, 97 So. 669; Arent vs. Hunter, et al., 171 La. 1059, 133 So. 157; Civil Code, Articles 793 and 794.

When the owner of a mineral servitude leases the same to third parties and they go upon the land and sink wells for the discovery of minerals, they (the lessees) are thereby exercising the rights of servitude held and enjoyed by their lessor, thereby preventing the running of prescription against their lessor's rights. Keebler vs. Seubert, supra; Lee vs. Giaque, supra; Arent vs. Hunter, et al., supra; Patton, et al., vs. Frost Lumber Industries, Inc., et al., supra; Johnson vs. Moody, et al., supra; Smith vs. Sun Oil Company, Inc., supra; Frost-Johnson Lumber Company vs. Nabors Oil & Gas Company, et al., supra.

When the owner of a mineral servitude enters upon the lands subject to such servitude, either himself or through his lessee, and there digs or mines for minerals and discovers and produces any mineral whatsoever, he thereby preserves his servitude in its entirety, inasmuch as the servitude is the right to exploit or develop and, as such, is indivisible. Patton, et al., vs. Frost Lumber Industries, Inc., et al., supra; Wilkins vs. Nelson, et al., supra; Arent vs. Hunter, et al., supra; Lee vs. Giaque, supra.

In the mineral conveyance dated January 12, 1917, Frost-Johnson granted to Federal, in addition to the right to retain a proportion of the minerals discovered and produced, certain other rights in the following language:

"Together with all and singular the perpetual right with grantors of possession and of ingress and egress at all times for the purpose of exploring, drilling, mining, and in every way operating for such minerals upon such premises and every part

> thereof, and to remove such minerals from the same, and with the right of erecting upon the premises all such buildings, derricks, tanks, reservoirs, pipe lines, telegraph and telephone lines or other improvements and equipment of every character which such grantees, respectively, their successors and assigns, may find necessary, proper or convenient for the exploration, using, enjoying or removing any and all such minerals, together with every incidental right essential to the complete enjoyment of the properties and privileges conveyed." (R. 153-154)

Under the law of Louisiana, this created in favor of Federal a mineral servitude which is indivisible, even though the benefits derived from the exercise of this servitude are divisible.

The consideration recited in the aforesaid grant is set forth in the following language, to-wit:

> "Now, therefore, in consideration of the premises and of all the terms and provisions of a certain operating contract and conveyance bearing even date herewith between the same parties hereby referred to and made a part hereof for every purpose and subject always to such terms and provisions, and in consideration of the payments and expenditures made and to be made by grantees in accordance with the terms of said operating contract and conveyance (to secure which payments and expenditures an express vendor's lien is reserved on the premises conveyed), * * *" (R. 83).

The operating contract therein referred to was entered into by the same parties at the same time and provides, among other things, that, if Frost-Johnson, as the owner of the land, should reimburse Federal, the owner of

the servitude, for one-half of the cost of drilling operations, then and in that event, Frost-Johnson would be entitled to one-half of the minerals thereafter produced by Federal from such well or wells with reference to which Frost had contributed one-half of the drilling costs. (R. 208).

Said instrument further provides that, should Frost-Johnson, as the landowner, fail to reimburse Federal for one-half of the drilling costs, then and in that event, Frost-Johnson would be entitled to only 1/16th of the minerals produced by Federal. The effect of these instruments was to vest in Federal a mineral servitude full and complete, subject only to the obligation on the part of Federal to account to Frost-Johnson for a proportionate part of the benefits derived from the operation of this mineral servitude. (R. 208).

Petitioner, in its brief, frequently refers to the fact that Federal obtained, by virtue of the instruments, dated January 12, 1917, a servitude on a one-half interest in the mineral rights. This statement, of course, is incorrect, as the foregoing recitation of facts clearly indicates that Federal acquired a complete servitude as to all mineral rights burdened, however, with an obligation to account to Frost-Johnson for a proportion of the benefits derived from the use of such servitude, such proportion to be controlled by the election of Frost-Johnson with reference to reimbursement for a proportionate part of the cost of the mineral development.

All rights with reference to this mineral servitude acquired by Federal by virtue of the instruments dated January 12, 1917, were assignable in whole or in part.

On December 23, 1920, Federal entered into certain agreements with Union, under which there was granted to Union the right (which right was also reserved by Federal), to conduct drilling operations on the land embraced in the mineral servitude held by Federal. In these instruments, the right was granted to Union to retain the gas discovered and produced as a result of such operation. This right, however, was subject to certain rights retained by Federal with reference to such gas.

We make this statement because petitioner, in its application for a writ, frequently states that, by the instruments dated December 23, 1920, there was conveyed to Union all of the gas and gas rights under the lands involved and that this conveyance constituted a dismemberment of the original servitude into two servitudes, namely, a gas servitude then held by Union, and a mineral servitude with reference to all other minerals, except gas, then held by Federal. A reference to the instruments dated December 23, 1920, will conclusively show that such instruments did not constitute a conveyance of all gas and gas rights. In the first instance, title to the gas could not be conveyed because, under the Louisiana law, minerals in place are not susceptible to ownership separate and apart from the soil, and the only thing that could be conveyed were certain rights under the servitude held by Federal which were the rights of development and exploration, together with the right to appropriate the natural gas which resulted from such development.

These instruments dated December 23, 1920, did not constitute a complete dismemberment of the gas rights

in favor of Union, because in said instrument, Federal reserved unto itself the following rights with respect to gas, namely:

(a) The right to take, without cost, gas from any wells drilled by Union for fuel purposes for any drilling conducted by Frost-Johnson and Federal of Louisiana; (R. 176)

(b) The right to go any place upon the land and to conduct drilling operations and, in the event such operations resulted in the discovery of gas and Union did not reimburse Federal for the cost of such drilling, in that event, the ownership of said well, together with the right to take and produce gas therefrom, remained vested in Federal; (R. 223)

(c) Joint participation by both of said parties in the operation and production of wells which be or become productive of both oil and gas, with the provisions setting forth in detail the methods in which said wells should be operated for the joint benefit of said parties; (R. 224)

(d) The obligation of each party before abandoning a well (irrespective of the mineral being produced therefrom) to tender the well to the other party; (R. 225-226)

(e) Obligations with reference to payments of taxes and contribution by each party for its respective part of such taxes; (R. 226)

(f) Reversionary rights with reference to the gas and gas rights by providing in said contract that, should Union ever desire to abandon any well, it must first tender such well to Federal in which event Federal could take over said well and continue to produce gas therefrom. (R. 225-226).

These provisions clearly indicate that said instruments did not constitute a complete dismemberment of the gas rights from the oil rights, but, on the contrary, show that the parties were simply providing for joint operation among themselves of the original indivisible servitude then held and enjoyed by Federal. While it is true that Frost-Johnson (the landowner) joined in these instruments dated December 23, 1920, it did so because of the fact that it was entitled to a proportion of the gas produced from said land and in order to release this claim in favor of Union, it became a party to the aforesaid instruments.

Petitioner contends that the instruments dated December 23, 1920, created a new servitude consisting of a gas servitude in favor of Union and that any subsequent operations done by Union were conducted under the provisions of the gas servitude and did not constitute an exercise of the servitude originally created in Federal. This contention is unsound for two reasons, namely:

1. Federal, not being the landowner, was powerless to create a gas servitude in favor of Union, because only the landowner has the power to impose burdens on the land in the nature of servitudes.

2. Frost-Johnson, as the landowner, could not create a gas servitude on these lands in favor of Union, because, having previously created a complete and indivisible mineral servitude in favor of Federal, it, Frost-Johnson, was powerless to create other mineral servitudes which would conflict with that previously created and then existing in favor of Federal.

It, therefore, follows that exploration and production conducted by Union and later by Interstate, the latter

having succeeded to the rights of Union as to part of the lands involved in this litigation, was done pursuant to the rights held under the mineral servitude created in the grant from Frost-Johnson to Federal dated January 12, 1917, and was for the joint benefit of all parties holding and claiming under such servitude, inured to their benefit collectively, and preserved the servitude in its entirety.

We, therefore, respectfully contend that the United States Circuit Court of Appeals has not rendered a decision in conflict with the Louisiana jurisprudence. It has, on the contrary, followed the Louisiana jurisprudence and has rendered a decision entirely consistent therewith.

We, therefore, submit that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES H. DURBIN,
T. J. ARNOLD,
SHOTWELL & BROWN.